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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL MULTI HOUSING COUNCIL, AND NATIONAL REALTY COMMITTEE IN SUPPORT OF PETITIONERS

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I. INTRODUCTION

The National Association of Industrial and Office Parks, International Council of Shopping Centers, Inc., National Association of Home Builders, National Multi Housing Council, and National Realty Committee file this brief *amici curiae* in support of Petitioners. The consent of counsel for each of the parties has been obtained and copies of a letter from each counsel indicating his consent have been filed

with the Clerk. *Amici* represent a broad cross-section of interests affected by the lower court's decision not represented by the petitioners or by the particular property at issue in this case. In addition, *Amici's* brief focuses on an issue not fully presented in the petition for writ of *certiorari*, i.e., the statutory concept of "waters of the United States," including the statutory purposes and structure, and the importance of the distinction between the term "waters of the United States" and all waters within the United States.

II. INTERESTS OF *AMICI CURIAE*

The National Association of Industrial and Office Parks (NAIOP) is an association formed in 1967 whose more than 7,000 member companies are developers and owners, mortgage bankers, contractors and constructors, municipalities and development commissions, and numerous other adjunct disciplines representing the industrial and office park industry.

The International Council of Shopping Centers, Inc. (ICSC) is the trade association for the shopping center industry. ICSC has over 28,000 members worldwide. Its members include developers, retailers, lenders, owners, managers and others having a professional interest in the shopping center industry. Its members represent virtually all of the 35,000 shopping centers in the United States.

The National Association of Home Builders (NAHB) represents 160,000 builders and associate members in all fifty states, the District of Columbia and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial

builders, as well as land planners, land developers and remodelers.

The National Multi Housing Council (NMHC) represents the interests of the multifamily rental housing industry. The members of NMHC are engaged in all aspects of the development and operation of rental housing, including the ownership, building, financing, management, and conversion to condominium or cooperative ownership of such properties.

The National Realty Committee (NRC) represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The development and building industries are among those industries in the nation most directly and adversely affected by the decision of the court below. If the lower court's decision is allowed to stand, NAIOP, ICSC, NAHB, NMHC and NRC members and many others who plan, finance, and carry out vital economic development projects for the benefit of the nation and its people will be severely affected by the removal of countless environmentally-sound and economically-viable development sites from the nation's already limited roster of developable sites.

Section 404 of the Clean Water Act requires those who wish to discharge dredged or fill material into "waters of the United States" to secure a permit from the U.S. Army Corps of Engineers (the "Corps"). In conjunction with the U.S. Environmental

Protection Agency (the "EPA"), the Corps has promulgated regulations setting forth criteria to guide the section 404 permit decisionmaking process (the "Guidelines"). 40 C.F.R. Part 230 (1990). The Corps also has promulgated its own set of section 404 regulations establishing a detailed "public interest" balancing process for determining whether a permit should be issued or denied.

NAIOP, ICSC, NAHB, NMHC and NRC members and others who develop large or small scale projects potentially subject to 404 program prohibitions and restrictions have long understood both the basic jurisdictional scope of the section 404 program and the particular requirements of the Guidelines, as well as the Corps' public interest review regulations. In 1989, however—at the same time the court below was considering the section 404 jurisdictional issue raised in this case—the Corps and EPA were developing a new, internal Memorandum of Agreement (the "MOA") on the type and level of "mitigation" necessary to comply with the Guidelines.

The MOA drastically alters the Corps' regulatory approach to permit decisionmaking for "special aquatic sites," including wetlands. In essence, it rescinds and supersedes the Corps' public interest review regulations. In place of a general balancing process, only one question need be asked, for example, with respect to a proposed project involving wetlands: Are wetlands involved? If so, issuance of a permit is presumptively contrary to the public interest. Only if the avoidance of wetlands is "impracticable" will other public interest factors even be considered. Thus, the MOA could frequently result in permit denial if wetlands are involved, even if the

proposed development has substantial economic and social benefits, *e.g.*, low-cost housing, jobs, public transportation, etc., and even if there are proposed positive environmental benefits to be gained through compensatory mitigation.

Although NAIOP, ICSC, NAHB, NMHC and NRC believe the MOA itself is an unlawful revision of the established Guidelines and the Corps' public interest review regulations, the point to be made here is that—when combined with the Corps' new "migratory bird" jurisdictional standard for redefining the scope of the section 404 program upheld by the court below—industrial and office parks developers, shopping center developers, home builders and developers of other income-producing property face the prospect of literally millions of acres of developable land being placed "Off Limits" by the Corps, no matter how substantial the benefits of proposed projects on these lands might be.

III. SUMMARY OF ARGUMENT

The court below, in holding that

> "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species . . . ,

has, in the name of protecting the quality of the nation's federal system of navigable waterways, engrafted onto the Corps of Engineers' definition of "waters of the United States" a radically new, implausible, and potentially massive federal intrusion into the state and local water management and pollution control domain, as well as local land use decisionmaking. Under the court's reasoning, all man-

made or natural depressions in the land which even temporarily contain virtually any amount of rainwater are deemed sufficiently "wet" as to be legally indistinguishable from wetlands, intermittent streams, or playa lakes, for example, which are subject to regulation by the Corps to the extent they could affect interstate commerce. Moreover, if any migratory birds or endangered species may inhabit these rainwater-wetted depressions, even temporarily, that alone would provide a sufficient nexus to interstate commerce for federal regulatory purposes. In essence, "waters of the United States" would be defined by the peregrinations of migratory birds, far beyond the physical, hydrological, and geographical concepts and limits imbedded in the statute and the established regulations of the Corps of Engineers. As discussed below, *amici* do not believe the statutory concept of "navigable waters" and the Corps' regulatory definition of "waters of the United States" can or should be stretched to this extreme or be defined by such an inherently arbitrary migratory bird standard.

It is accepted law that the term "waters of the United States," as used in the Clean Water Act, is not limited to traditional notions of navigability. Courts have upheld its application, for example, to certain non-navigable, man-made surface water impoundments, to certain natural surface depressions which hold water only on a seasonal basis, and to certain waters which, among other things, provide habitat to migratory birds or endangered species. Prior to this case, however, no court has interpreted "waters of the United States" in such a manner as to sanction federal control over all minimally wet surface depressions whose sole nexus to interstate com-

merce is the sometime potential presence of migratory birds or endangered species. No court has previously sanctioned federal regulation of the millions of additional acres of man-made and natural surface depressions that are encompassed by the court's decision. Such a sweeping expansion of the Corps' section 404 regulatory jurisdiction—to include virtually all areas where the rain falls and the birds fly (and come to rest)—is not required or authorized by the Clean Water Act, nor is it in the public interest.

IV. ARGUMENT

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill material into "navigable waters" without a permit from the Corps of Engineers. 33 U.S.C. § 1344 (1982). The term "navigable waters" is defined in the Act as all "waters of the United States." 33 U.S.C. § 1362(7) (1982). The Corps, in turn, has defined "waters of the United States" by regulation to encompass seven general classifications of waterbodies. 33 C.F.R. § 328.3(a) (1990). The only such classification relevant to this case—sometimes referred to as the "isolated waters" classification because these waters are not physically or hydrologically connected to any other Corps-defined "waters of the United States"—is "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands [including wetlands adjacent to other defined 'waters of the United States'], sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . . " 33 C.F.R. § 328.3(a)(3) (1990).

The court below upheld the Corps' determination that the property here in question—petitioners' abandoned salt crystallizers and calcium chloride pits, which sometimes contain a few inches of collected rainwater—qualified as "other waters" under the foregoing classification because the property's use or alteration could affect interstate birds (it is unclear whether the endangered mouse involved here also is an interstate species or how it otherwise could affect interstate commerce). Thus, the court concluded that these artificially created, "seasonal" waterbodies, which sometimes may be inhabited by migratory birds or endangered species, are subject to the Corps' section 404 regulatory jurisdiction. *Amici* submit that such an extreme result is not apparent on the face of the Clean Water Act or the Corps' regulations, and was not within the contemplation of the drafters of the statute or the regulations.

The statute itself evidences an intent that the term "waters of the United States," which the statute does not define, be construed in light of the statutory purpose to prevent discharges of dredged or fill material into such waters if they will have an unacceptable adverse effect on certain specified water quality-related uses of what for present purposes will be termed "federal waters," *i.e.*, on the use of such federal waters for municipal water supplies, shellfish beds and fishery areas, wildlife, and recreational areas. 33 U.S.C. § 1344(c) (1982). Fundamentally, therefore, if these specified water quality-related uses of "federal waters" are not implicated with respect to a particular local area or activity, the "local waters" involved are not subject to the prohibitions or restrictions of the Corps' section 404 program.

Courts interpreting the term "waters of the United States" under the Clean Water Act have affirmed its reach beyond traditional "navigable waters" but, prior to the case at bar, they have found federal jurisdiction to exist only in cases involving actual navigable waterways, immediate tributaries to navigable waterways, and wetlands adjacent to navigable waterways. *See, e.g., Utah v. Marsh*, 740 F.2d 799, 800-01 (10th Cir. 1984) (navigable lake of 150 square miles); *United States v. Byrd*, 609 F.2d 1204, 1205 (7th Cir. 1979) (2,500 to 3,000 acre navigable lake); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1380-81 (D.D.C. 1975) (mangrove swamp below mean high water, adjacent to navigable waterway); *United States v. Holland*, 373 F. Supp. 665, 667, 673, 676 (M.D. Fla. 1974) (tidal canals and wetlands adjacent to navigable waters, frequently flooded by tidewater). No court has previously found federal jurisdiction to exist where there is no physical or hydrological connection between a sometimes "wet" parcel of land and the federal waters and uses thereof which Congress intended the Clean Water Act to protect.

As a practical matter, virtually all land is sometimes wet, and virtually all land is free to be used by migratory birds or endangered species. It is evident from the structure as well as the purpose of the Clean Water Act, however, that Congress did not intend to subject to *federal* regulation virtually all the land surface within the United States on which rainfall is collected or channelized by nature or by man. Only certain collected and channelized waters were deemed to be within the proper legal and practical regulatory reach of federal law. The federal system of navigable waterways and waterbodies hydrologi-

cally connected thereto—waters "of" or belonging to the United States—defines the *federal* regulatory reach of the Clean Water Act.

In order to protect the quality of "federal waters," Congress devised two "point source" programs to regulate the discharge into these waters of pollutants generally (section 402 of the Act, administered by the United States Environmental Protection Agency ("EPA") and dredged or fill material specifically (section 404, administered by the Corps in consultation with EPA)). To the extent rainfall runoff from diffuse or "non-point" sources reaches federal waters, it also may be subject to control plans and requirements established under section 208 and other provisions of the Act. Beyond the reach of federal waters and federal regulatory programs, however, lie millions of acres of land surface within the United States upon which rainwater falls and is collected in varying ways and varying degrees by nature or by man, but which never reaches the physical, hydrological, or geographical limits of federal jurisdiction. Protection of the quality of these previously accepted non-federal waters is solely within the province of state and local governments.

To overcome the federal government's inability to regulate those waters and activities which lie beyond the previously accepted physical, hydrological, or geographical limits of "waters of the United States," it is difficult to imagine a more sweeping means of doing so than to allow the possible visitations of migratory birds to define "waters of the United States." In essence, this is what the Corps has proposed and what the court below has accepted. "Federal waters" jurisdiction over the land surface would be defined by

the whim of birds in the air. Such a basis for defining the jurisdictional reach of "waters of the United States" is either the epitome of arbitrariness or, perhaps, a mask for the proposition that virtually *all* surface waters *within* the United States are "federal waters" subject to the section 404 program. Beyond its inherent arbitrariness (or a revolutionary attempt to assert federal control over all surface waters within the United States), *amici* see two fundamental problems with this radically new way of defining "waters of the United States."

Substantively, there is no reasonable basis in the Clean Water Act to conclude that Congress intended or believed it was necessary for the Corps of Engineers to be the guardian of every pit, pond, and puddle in the nation that might be visited by a transitory bird or by an interstate traveler in search of an endangered mouse. If such was necessary to achieve the Act's purpose or had been Congress' intention, Congress might as well as have attempted to assert directly that federal jurisdiction exists over every waterbody of every description *within* the United States. It is evident, however, that Congress had no such intention.

The fact that Congress intended the Clean Water Act to protect the use of "waters of the United States" by "wildlife" and to protect "recreational areas," in addition to water supply and aquatic ecosystem uses of federal waters, does not mean that the term "waters of the United States" should be stretched beyond its otherwise reasonable limits. It cannot be assumed that Congress had in mind waters other than those which could affect *federal* wildlife preserves and *federal* recreational areas. More spe-

cifically related to this case, it is even less plausible that Congress understood, much less intended, that the word "wildlife" might be interpreted to include the jurisdictionally-expansive movements of migratory birds or that "recreational areas" might be interpreted to encompass the potentially far-reaching peregrinations of professional or recreational bird and endangered species watchers. Perhaps the best evidence that Congress did not contemplate such a result is the fact that it took EPA and the Corps themselves some 13 years (from the statute's enactment in 1972 until 1985) to discover this new, more expansive method of redefining "waters of the United States."

EPA's 1985 discovery of a migratory bird basis for expanding federal jurisdiction under section 404, and its subsequent informal endorsement by the Corps in 1986, leads to the second fundamental problem with the new migratory bird standard for defining "waters of the United States." It is an illegal "substantive rule," as the Fourth Circuit Court of Appeals so held in *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989), because it meets all the accepted criteria of a "rule" and was adopted by the Corps in violation of the notice and comment rulemaking requirements of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553 (1982).

If there is any doubt about what kind of pronouncement the Corps intended to issue in 1986, it should be clear from the Corps' assertions in the court below, as well as the court's own conclusion of law, that the Corps' new migratory bird jurisdictional standard is far more than a mere "interpretation" of existing law or statement of non-binding Corps policy.

It demonstrably expands, by millions of acres, the Corps' claimed jurisdiction to regulate dredge and fill activities associated with "local waters," activities and waters never previously covered by federal regulatory requirements.

Even if this Court should find that the Corps' new migratory bird jurisdictional standard is a permissible "interpretation" of the statute and the Corps' established regulations, the question arises as to what degree of judicial deference, if any, should be accorded the Corps' interpretation in deciding whether it is "reasonable." *Amici* submit that, having been adopted by *informal* means, *i.e.*, by a November 1985 Corps "Memorandum" and by preambular statements accompanying the Corps' November 1986 regulations, without any involvement by the public generally or the regulated community in particular, the Corps' new "interpretation" should be granted no greater judicial deference than that expressed by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. *See generally*, Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 Yale J. on Reg. 1 (Winter 1990) (in which Professor Anthony compares *Skidmore*, which involved agency "interpretative bulletins" and informal agency rulings, with *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which involved an agency interpretation made in the context of rulemaking, and discerns a frequently missing "step" in the judicial consideration of whether an agency has reasonably interpreted an issue on which the statute is either silent or ambiguous, *i.e.*, whether the agency's interpretation "in the format it uses" may be given binding effect.)

The Clean Water Act might well be considered somewhat ambiguous with respect to the intended meaning of "waters of the United States." The statute's interchangeable use of "navigable waters" and "waters of the United States," however, strongly indicates a close jurisdictional tie between "waters of the United States" and the federal navigational servitude under the Commerce Clause. U.S. Constitution art. I, § 8, cl. 3. As previous courts have ruled, however, "waters of the United States" does encompass certain other waters not historically deemed to be "navigable waters." For that reason, the term "federal waters," as used previously in this brief, may be more appropriate when referring to those waters subject to federal jurisdiction under the Clean Water Act. It seems clear, in any event, that "waters *of* the United States" (or "federal waters") is not the same as all waters *within* the United States.

If the Corps' intent, or the effect of the Corps' adoption of the new migratory bird jurisdictional

standard, is to establish "federal waters" jurisdiction over virtually all waters *within* the United States—which is the practical consequence of the court's decision below, even if it was not the Corps' actual intention—there should be no question regarding its status as a "substantive rule." The effect of changing "of" to "within" is to shift water pollution control, not to mention associated land use decisionmaking, almost entirely into the federal domain. Such a revolutionary change surely cannot be allowed without a clear Congressional directive (assuming such would be constitutionally permissible), much less be allowed by administrative agency fiat.

V. CONCLUSION

The lower court's ruling, which allows the Corps to expand its section 404 regulatory jurisdiction to include "local waters which may provide habitat to migratory birds and endangered species," is not authorized by or necessary to achieve the purpose of the section 404 program. The decision of the court below, moreover, ignores the structure of the Clean Water Act and its essential division of authority and responsibility as between the federal government and state and local governments. Beyond the established and generally well understood physical, hydrological, and geographical limits of federal jurisdiction over navigable waters and their adjunctive waters, the lower court has approved a revolutionary and extremely arbitrary new criterion for defining "waters of the United States" by reference to the possible flight plans and ground-level visitation choices of migratory birds. Such a jurisdictional standard, if not the epitome of arbitrariness, can only mean that the federal government now claims jurisdiction over vir-

tually all waters of every description *within* the United States.

For the foregoing reasons, in addition to those set forth in the Petition of Leslie Salt Co. and Cargill, Inc., *amici curiae* National Association of Industrial and Office Parks, International Council of Shopping Centers, Inc., National Association of Home Builders, National Multi Housing Council, and National Realty Committee respectfully urge the Court to grant *certiorari* and reverse the decision of the Court of Appeals.

Respectfully submitted,

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